

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FABIAN VAKSMAN,
Plaintiff,

v.

MICHAEL W. WYNNE, Secretary,
Department of the Air Force,
Defendant.

No. CV-07-225-FVS

ORDER GRANTING SUMMARY
JUDGMENT

THIS MATTER comes before the Court based upon cross motions for summary judgment. The plaintiff is representing himself. The defendant is represented by Assistant United States Attorney Andrew S. Biviano and Captain Shawn Tabor.

BACKGROUND

Fabian Vaksman suffers from Attention Deficit Hyperactivity Disorder ("ADHD"). The Department of the Air Force ("Air Force") conditionally hired Mr. Vaksman as a civilian historian and assigned him to Fairchild Air Force Base ("Fairchild"). In order to keep his job, he had to successfully complete two years of probation and the Air Force's Civilian Historian Orientation Course. The latter is offered at Maxwell Air Force Base ("Maxwell"). He began the course during the last week of February of 2005. While studying at Maxwell, he stayed in a local motel. Despite receiving multiple offers of assistance from his instructors and fellow students, and despite

1 accepting some assistance from them, he failed the course. He checked
2 out of his motel on March 19th. During the process, he antagonized
3 motel employees to the point that the general manager sent a letter of
4 complaint to one of his instructors. When Mr. Vaksman returned to
5 Fairchild, he antagonized an Air Force sergeant to the point that she
6 complained to her superiors. On April 18, 2005, the Air Force fired
7 him. He filed a complaint with the Equal Employment Opportunity
8 Commission ("EEOC") alleging that the Air Force discriminated against
9 him on the basis of a disability, viz., ADHD. The EEOC assigned his
10 complaint to an investigator. Both before and after filing the
11 complaint, he sent a number of contentious emails to various Air Force
12 personnel. One of the emails is dated July 11, 2005. In it, he
13 describes a certain Air Force officer as the "epitome of evil. . . .
14 We have to throw this ANTI-INTELLECTUAL TRASH out of the AF history
15 program before its too late" (Defendant's Statement of
16 Material Facts (Ct. Rec. 72), Exhibit AA (capitals in original.)) Mr.
17 Vaksman did not stop there. He also says, "Do NOT deny this
18 unconstitutional scum its Constitutional due process! The God-damned
19 traitors and cowards must be SHOT for their assault on The First
20 Amendment and rot in hell" *Id.* (capitals in original). The
21 EEOC investigator concluded that Mr. Vaksman had presented
22 insufficient evidence of disability discrimination to qualify for
23 relief. He requested review by an EEOC Administrative Judge ("AJ").
24 After considering the materials submitted by the parties, the AJ ruled
25 that Mr. Vaksman had failed to establish a prima facie case of
26 disability discrimination. This action followed. The matter comes

1 before the Court based upon cross motions for summary judgment.

2 **RULING**

3 In order to state a prima facie case under the Rehabilitation Act
4 of 1973, Mr. Vaksman must offer evidence indicating that (1) he is a
5 person with a disability, (2) who is otherwise qualified for
6 employment, and (3) suffered discrimination because of his disability.
7 *Walton v. United States Marshals Service*, 492 F.3d 998, 1005 (9th
8 Cir.2007). It is questionable whether Mr. Vaksman is a disabled
9 person. Although his ADHD can be controlled with medication, and
10 although he could have taken medication during the Civilian Historian
11 Orientation Course, he chose not to do so. See *Sutton v. United Air*
12 *Lines, Inc.*, 527 U.S. 471, 482, 119 S.Ct. 2139, 2146, 144 L.Ed.2d 450
13 (1999) ("if a person is taking measures to correct for, or mitigate, a
14 physical or mental impairment, the effects of those measures -- both
15 positive and negative -- must be taken into account when judging
16 whether that person is 'substantially limited' in a major life
17 activity and thus 'disabled'"). Furthermore, even if Mr. Vaksman is
18 disabled, he is not "otherwise qualified" to work for the Air Force as
19 a civilian historian. His emails and other writings are a matter of
20 record.¹ Mr. Vaksman's writings contain insulting and belligerent
21 statements, some of which are violent in nature.² In view of these,

22
23 ¹In evaluating the defendant's summary judgment motion, the
24 Court has not considered those oral statements and behaviors that
the defendant attributes to Mr. Vaksman but which he disputes.

25 ²Mr. Vaksman has filed a number of letters with the Court
26 since commencing this action. Several contain inflammatory
accusations.

1 it is clear that he lacks the interpersonal skills and judgment
2 necessary to serve the Air Force as a civilian historian.

3 **IT IS HEREBY ORDERED:**

4 1. Mr. Vaksman's motion for summary judgment (**Ct. Rec. 18**) is
5 denied.

6 2. The defendant's motion for summary judgment (**Ct. Rec. 70**) is
7 granted.

8 3. Mr. Vaksman's claims against the defendant are dismissed with
9 prejudice.

10 4. The Court will not entertain a motion for reconsideration.

11 **IT IS SO ORDERED.** The District Court Executive is hereby
12 directed to file this order, furnish copies to the plaintiff and to
13 counsel for the defendant, enter judgment accordingly, and close the
14 case.

15 **DATED** this 5th day of September, 2008.

16 s/Fred Van Sickle
17 Fred Van Sickle
18 Senior United States District Judge
19
20
21
22
23
24
25
26